CHON THEN TICK

v.

METROPLEX DEVELOPMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
BALIA YUSOF WAHI J
[CIVIL SUIT NO: S3-22-600-2002]
30 DECEMBER 2009

LAND LAW: *Sale and purchase agreement - Breach of - Developer rescinded contract and refunded monies to purchaser when construction of property was deferred - Property later developed and sold to third party - Whether developer in breach of agreement - Whether purchaser entitled to recover property*

CIVIL PROCEDURE: *Pleadings - Badly drafted pleadings - Reliefs sought not clear - Whether rights of parties affected*

Pursuant to a sale and purchase agreement, the plaintiff purchased a proposed 2 storey link house to be erected on a lot of land ('the property') from the defendant developer on 12 March 1991. The purchase price was RM105,784 and the plaintiff paid a 10% deposit sum of RM10,578. The property was to be completed within two years from the date of the agreement and failure to do so would entitle the purchaser to liquidated damages calculated day to day at the rate of 10% per annum. Time was also the essence of the agreement. On 15 December 1993 the defendant informed the plaintiff that the construction of the property was deferred due to a squatters' problem. The defendant rescinded the contract and refunded all the monies to the plaintiff. The defendant also offered the plaintiff to purchase another unit from any of the defendant's other housing schemes but the plaintiff refused the offer. It was noted that the plaintiff was paying for the assessment rate for the property up to the year 2001 on the instructions of the defendant. The plaintiff later discovered in 2001 that the defendant had developed the property and so lodged a caveat on the property which was subsequently removed. The plaintiff's application for an extension of the caveat was also dismissed by the court. The plaintiff had since filed an appeal on 24 May 2005 against that order pending in the Court of Appeal at the date of the hearing. The plaintiff also discovered that the property was sold to a third party

on 29 June 2001 in the sum of RM229,190. That led to the plaintiff's action against the defendant on 5 June 2002 and the defendant's counterclaim for damages for the wrongful entry of the caveat, interest on damages and costs. The defendant contended that the plaintiff's action was time-barred under s. 6 of the Limitation Act 1953 as the cause of action arose on or about 12 March 1993. Also, the relief of specific performance was not open to the plaintiff due to the delay on the plaintiff's part in instituting the action. Since the property was sold to a third party, the court was precluded from making any order which affected the rights and interests of the third party without the third party's presence in court. Further, the plaintiff's pleading indicated that the prayers asked for was merely for a declaratory order and not for recovery of land to which s. 9 of the Limitation Act 1953 was applicable.

Held (allowing the plaintiff's claim):

(1) The prayers sought by the plaintiff in his pleadings were confusing. It was difficult to ascertain whether the reliefs sought were one of declaration, specific performance or damages for breach of contract. Nonetheless, it was a well-established principle that the object of courts was to decide the rights of the parties and not to punish them for mistakes made in the conduct of their cases by deciding otherwise than in accordance with their rights. So long as the error or mistake was not fraudulent or intended to overreach, the courts would, if no injustice was occasioned to the other party, adjudicate on the matter. The courts would also make orders as the justice of the case required which might not necessarily mean the orders actually in terms as prayed for by the parties. (paras 7 & 8)

(2) The plaintiff's action was one for the recovery of land. The plaintiff alleged that he was entitled to the land and that he wanted the land. If the court agreed, it was to make a declaration asked for and the consequential order on the registering authority. The being the case s. 6 of the Limitation Act did not apply but s. 9 of the same did. (para 9)

(3) There was a clear breach of the agreement and the plaintiff was entitled to recover the property. One possible way of restoring the plaintiff's right to the property was to allow the plaintiff's claim, although not couched in the clearest of terms, that the contract should be specifically performed. The consequential

orders should also be allowed and costs awarded to the plaintiff. The title of the property was still registered in the defendant's name and was not transferred to the third party. As such, any difficulty in implementing the contract was not foreseen. (para 10)

(4) The defendant failed to prove any evidence of loss or damages for its counterclaim for damages for the wrongful entry of the caveat. (para 11)

[No order made as to the plaintiff's claim for damages and interest thereon; defendant's counterclaim dismissed.]

Case(s) referred to:
Bonham Carter v. Hyde Park Hotel [1948] WN 89 ***(refd)***
Cropper v. Smith [1884] 26 Ch D 700 ***(refd)***
Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors [1996] 2 CLJ 185 SC ***(refd)***
Lee Sau Kong v. Leow Cheng Chiang [1960] 1 LNS 56 HC ***(refd)***
Padang Serai Kilang Kayu Bhd. v. Khor Kia Fong & Ors [1997] 5 CLJ 428 ***(refd)***
Ponnusamy & Anor v. Nathu Ram [1958] 1 LNS 46 HC ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 6, 9

For the plaintiff - ST Lee; M/s ST Lee & Partners
For the defendant - Wong Rhen Yen (Mohd Ali Khir with him); M/s Dennis Nik & Wong

Reported by Usha Thiagarajah

JUDGMENT

Balia Yusof Wahi J:

Background

[1] By a sale and purchase agreement dated 12 March 1991 the plaintiff contracted with the defendant to buy a property on Lot No. 872101 together with a 2 storey Link House to be erected thereon described as Type Astra. The purchase price was RM105,784. The plaintiff has paid 10% of the purchase price amounting to RM10,578 as deposit. By cl. 20 of the said agreement, the building

was to be completed by the vendor and vacant possession be granted to the purchaser within 24 months of the date of the aforesaid agreement and in the event of the vendor's failure to do so, the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of 10% per annum of the purchase price. It was further agreed that time is of the essence of the contract. By a letter dated 15 December 1993 (exh. D24) the defendant informs the plaintiff that the construction of the said property has to be deferred because of squatters problem and the defendant proposed to rescind the contract and refund all the monies to the plaintiff. At the same time the defendant also offered the plaintiff to buy another unit from any of the defendant's other housing schemes located in Ampang, Cheras or Puchong. The plaintiff refused the offer (exhs. P4, P5, P11, P12, P13). The plaintiff has also been paying for the assessment rate for the said property up to the year 2001 (exh. P15). This was done by the plaintiff on the instruction of the defendant through their letter dated 2 August 1996 (exh. P16), and by a letter dated the same, the defendant has also intimated to the Majlis Perbandaran Ampang Jaya that any notice of assessment for the said property should be directed directly to the purchaser, namely the plaintiff (exh. P17).

[2] Sometime in the year 2001, it was discovered by the plaintiff that the defendant had developed the project and immediately instructed his solicitors Messrs Yazid Baba & Partners on 23 April 2001 to inquire from the defendant as to the status of the project (exh. P18) to which there was no reply. On 24 May 2001 the plaintiff's solicitors Messrs ST Lee & Partners wrote to the defendant demanding for the status of the project and the said sale and purchase agreement (exh. P20). In response, the defendant replied *via* their letter dated 24 September 2001 (p. 11 of the Agreed Bundle of Document in encl. 17) informing the plaintiff that the said sale and purchase agreement had lapsed and at the same time forwarded a cheque for RM10,784 being a refund for all monies paid by the plaintiff. The plaintiff also discovered that the said property had been sold to a third party, one Loh Keong on 29 June 2001 (exh. P21) for RM229,190. Earlier, on 10 April 2001, the plaintiff has lodged a caveat on the said property but was subsequently removed and the plaintiff's application for an extension of the caveat was dismissed by the court. The plaintiff has since filed an appeal on 24 May 2005 against that order which is still pending in the court of appeal at the date of the hearing. The plaintiff filed this action against the defendant on 5 June 2002.

The Plaintiff's Claim

[3] An issue has arisen as to the nature of the plaintiff's claim in this suit and for that reason I deem it fit to reproduce the claims of the plaintiff *in extenso* as pleaded in his statement of claim which is in Bahasa Malaysia and it reads as follows:

12. Oleh yang demikian, plaintif memohon bahawa:

(i) suatu perintah deklarasi bahawa defendan menjualkan hartanah Lot No: B7/2101 Type Aras dengan sebuah 2 Tingkat Link Rumah menurut terma-terma Perjanjian Jual Beli bertarikh 12.3.1991 kepada plaintif;

(ii) suatu perintah deklarasi bahawa dalam jangka masa 14 hari selepas pembayaran baki harga jualan di bawah Perjanjian Jual Beli bertarikh 12.3.1991 oleh plaintif atau financenya kepada defendan.

(iii) suatu perintah deklarasi bahawa dalam jangka masa 14 hari selepas pembayaran baki harga jualan di bawah Perjanjian Jual Beli bertarikh 12.3.1991 oleh plaintif atau financenya kepada defendan, defendan hendak menyempurnakan dan melaksanakan dokumen-dokumen pindahmilik hartanah dan dokumen-dokumen yang lain bagi tujuan pindahmilik hartanah tersebut kepada plaintif. Jikalau defendan gagal, enggan dan cuai berbuat demikian, Timbalan Pendaftar/Penolong Kanan Pendaftar Mahkamah Tinggi, Kuala Lumpur mempunyai kuasa penuh untuk menyempurnakan dan melaksanakan dokumen-dokumen pindahmilik hartanah tersebut dan dokumen-dokumen lain bagi tujuan pindahmilik hartanah tersebut kepada plaintif tanpa apa-apa rujukan kepada defendan;

(iv) gantirugi umum ditaksirkan;

(v) Faedah 8% yang dikirakan atas kadar setahun atas jumlah ganti rugi umum ditaksirkan dari tarikh penghakiman sehingga penyelesaian penuh oleh defendan kepada plaintif;

(vi) Kos guaman dibayar oleh defendan; dan

(vii) Relif-relif lain yang dianggap berpatutan oleh Mahkamah Yang Mulia ini.

The Defendant's Case

[4] DW1, the manager of the defendant gave evidence which in its totality confirm and is in full accord with the background facts as stated earlier in this judgment. He also testified that although the sale and purchase of the developed property to a third party has been completed, the title to the same is still in the defendant's name and has not yet been transferred to the said new buyer, Loh Keong. Because of the existence of the caveat on the said property the defendant allege that it was unable to complete the transaction with the third party and has incurred losses and damage. By way of counterclaim the defendant is claiming damages for the wrongful entry of the caveat, interest on the said sum of damages and costs.

[5] The defendant contends that the plaintiff's action is time barred under s. 6 of the Limitation Act 1953 as the cause of action has arisen on or about 12 March 1993.

[6] In his submission, learned counsel for the defendant also submitted that because of the delay on the part of the plaintiff in instituting this action against the defendant the relief of specific performance is not open to the plaintiff and since the property has been sold to a third party, this court is precluded from making any order which affects the rights and interests of the third party without their being present in court. The learned counsel further submits that the plaintiff's pleading indicate that the prayers asked for is merely for a declaratory order and not for a recovery of land to which s. 9 of the Limitation Act 1953 would be applicable.

Findings Of The Court

[7] On my perusal of the plaintiff's pleading, I am constrained to say that it fell far below the standard of drafting expected of lawyers of his standing. It was drafted in Bahasa Malaysia no doubt, but a lack of understanding and proficiency in the language cannot be an excuse for producing such a badly drafted pleading. If counsel really finds it a difficulty to draft the pleadings in Bahasa Malaysia, why is the English translation not made available? Bahasa Malaysia is the official language of the court and I would strongly urge those who are still lacking in proficiency in the language to buck up and make serious efforts mastering it. In this respect I tend to agree with the learned counsel for the defendant's submission as to whether the reliefs sought by the plaintiff is one for a declaration,

a specific performance or for damages for the breach of the contract. I must confess that reading the prayers sought by the plaintiff can be very confusing, to say the least. It is for this reason that I took the liberty to reproduce the plaintiff's prayers for relief *in extenso* at the beginning of this judgment.

[8] Be that as it may, it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. So long as the error or mistake is not fraudulent or intended to overreach, the courts will, if no injustice will be occasioned to the other party, adjudicate on the matter (see *Cropper v. Smith* [1884] 26 Ch. D 700). It is also trite that the courts will make orders as the justice of the case requires which may not necessarily mean the orders actually in terms as prayed by the parties. In *Khaw Poh Chhuan v. Ng Gaik Peng & Yap Wan Chuan & Ors* [1996] 2 CLJ 185, Peh Swee Chin FCJ stated at p. 215:

> We propose to make certain orders later, and it will be seen that these orders will be the orders that the justice of this case requires but may not be the orders actually in terms as prayed for at the end of the statement of claim of the assignee, but we bear in mind that the court can grant any relief as required by the justice of this case so long as such relief is not inconsistent with the reliefs that are expressly asked for: See *Cargill v. Bower* [1879] 10 Ch D 502.

[9] Upon a close scrutiny of the plaintiff's pleading I am of the considered view that the action of the plaintiff is one for the recovery of land. What the plaintiff is alleging is that he is entitled to the land and he wants that land. If the court agrees, it is to make a declaration asked for and the consequential order on the registering authority (see *Ponnusamy & Anor v. Nathu Ram* [1958] 1 LNS 46). That being the case, s. 6 of the Limitation Act 1953 does not apply but s. 9 of the same does. In *Padang Serai Kilang Kayu Bhd. v. Khor Kia Fong & Ors* [1997] 5 CLJ 428, Alauddin Mohd Sheriff J (as he then was) stated at pp. 433-434 as follows:

> An action to recover land is governed by s. 9(1) of the Limitation Act 1953 which provides:
>
> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

In this connection, the decision of the Court of Appeal in *Ponnusamy & Anor v. Nathu Ram* [1959] 1 LNS 73 bears a lot of relevance. It was held by the Court of Appeal that whether the period of limitation was six years by reason of s. 6, or twelve years by reason of s. 9 depends on the nature of the plaintiff's claim. As the plaintiff's claim in that case was for a declaration that they were entitled to the land, therefore, the action was 'to recover land' within the meaning of s. 9 of the Limitation Ordinance (as it was then).

At p. 88 of the judgment Thomson CJ (as he then was) held:

> Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within s. 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of action founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By s. 9, however it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be twelve years and it is clear that this applies to all action to recover land irrespective of whether they are founded on contract or otherwise.

The same view was adopted by the Federal Court in *Nasri v. Mesah* [1970] 1 LNS 85. Gill FJ (as he then was) in his judgment said:

> It follows, therefore, that whether the action is for specific performance of an agreement for sale of land or for declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be twelve years in either case (See also *Ho Ah Kim v. Paya Trubong Estate Sdn. Bhd* [1985] 1 LNS 13; [1987] MLJ 143 and *Wong Sin Meng v. Wong Sam Moi* [1991] 4 CLJ 221 (Rep); [1991] 2 CLJ 1223; [1992] MLJ 27).

> Based on the authorities indicated above, I hold that the period of limitation in relation to an action for recovery of land, as in this case, is 12 years.

[10] There is a clear breach of the agreement and the plaintiff is entitled to recover the property. One possible way of restoring the plaintiff's right to the said property is to allow the plaintiff's claim in prayer (i) of para. 12 of the statement of claim which in effect means that the contract to be specifically performed, although it is not couched in the best or clearest term. The consequential orders

as prayed in paragraphs (ii) and (iii) are also allowed and costs to be awarded to the plaintiff. The property is still registered in the name of the defendant and has not been transferred to a third party and as such I do not foresee any difficulty in implementing the contract. I make no order as to the plaintiff's claim for damages and interest thereon.

[11] On the defendant's counterclaim, the order prayed for in para (a) of the reliefs claimed by the defendant in its counterclaim against the plaintiff has been overtaken by events. Hence, the learned counsel has withdrawn prayers (a) and (b) of the said counterclaim. The defendant however still maintains its counterclaim for damages for the wrongful entry of the caveat, interest thereon and costs. The defendant has failed to prove any evidence of loss or damages as alleged. The evidence of DW1 merely confirms the facts and circumstances of the case as asserted by the plaintiff which I have narrated as the background facts to the case. No further evidence has been adduced let alone the damages as alleged. If a party brings an action for damages, it is for them to prove their damages, it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it. (per Thomson CJ in *Lee Sau Kong v. Leow Cheng Chiang* [1960] 1 LNS 56, quoting a passage of Lord Goddard's *dictum* in *Bonham Carter v. Hyde Park Hotel* [1948] WN 89.)

On that note, the defendant's counterclaim is hereby dismissed.